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Lim Chong Yean v Koperasi Pegawai Hutan Melayu & Anor

B HIGH COURT (KUALA LUMPUR) — WRIT ACTION NO 22NCvC-583–10 OF 2013
AZIMAH OMAR J
28 JUNE 2021

C *Contract — Damages — Assessment — High Court allowed specific performance of sale and purchase agreement — Court of Appeal varied High Court's order and ordered damages in lieu of specific performance — Assessment of damages — Whether date of breach was date when Court of Appeal handed down its judgment or date when first defendant failed to submit letter requested by State Authority — Whether valuation report relied upon by plaintiff could be used to* D *ascertain market value of property — Whether plaintiff's damages could be calculated by using normal measure of damage in contracts for sale of immoveable property*

E The first defendant as the owner of a property situated in Kuala Lumpur ('the property') had entered into a sale and purchase agreement ('SPA 2006') of the property with the plaintiff and pending the completion of the transfer, with the first defendant's consent, the plaintiff had taken possession of the property. However, the sale of the property did not materialised because the consent of Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur ('JKT') was F not obtained. Although the SPA 2006 was not completed, the plaintiff had continued to retain possession of the property upon payment of rental. Subsequently, the first defendant had entered into a sale and purchase agreement of the property with the second defendant ('SPA 2012') and this transaction was successful as the second defendant was registered as the G registered proprietor of the property. Discontented with the conduct of the defendants, the plaintiff had filed an action against the former premised on the arguments that the SPA 2006 was still enforceable and had not been terminated and that the first defendant had failed to fulfill its obligations namely to use or to exercise its best endeavours and efforts to obtain the consent H of the JKT. The High Court ('the HC') agreed with the plaintiff and allowed specific performance of the SPA 2006. On appeal, the Court of Appeal ('the COA') varied the HC's order in that the COA had ordered damages to be awarded to the plaintiff in lieu of specific performance to be assessed by the HC judge ('the HCJ'). The COA had also ordered the first defendant to refund the I deposit paid by the plaintiff under the SPA 2006 together with judgment interest of 5%pa from the date of the judgment of the High Court. The present action was in relation to the assessment of damages. By relying on a valuation report dated 28 March 2018, the plaintiff claimed the sum of RM1.25m being damages for the first defendant's breach of duty to act on the best endeavours

and efforts clause under the SPA 2006. The plaintiff contended that the date of the breach was the date when the COA handed down its judgment ie on 28 July 2017 whereas the first defendant contended that the date of the breach was the date when the first defendant failed to submit the letter requested by the State Authority vide a letter dated 10 July 2007.

Held:

(1) The law was trite that the plaintiff as the claimant bore the legal burden to prove that he had actually suffered loss as a result of the first defendant's breach. As a general rule, in cases of contractual breach, damages should be assessed as at the date of breach. In the present case, the contract entered between the plaintiff and the first defendant was a contract for the sale of an immoveable property (see paras 33 & 36).

(2) It was incorrect for the plaintiff to take the date of the COA's decision as the date of breach or the date when the contract was lost because: (a) the COA did not make such ruling; (b) the COA's decision was basically endorsing the HCJ's finding of facts that the first defendant was in breach of the SPA 2006 when it had not acted in compliance of the best endeavor clause, therefore, the plaintiff could not assume that the substitution of the specific relief order to an award of damages to be the cut-off date of non-granting of the specific performance entitling the plaintiff to take the date of the COA's judgment to measure his damages; (c) the first defendant's failure to respond to the State Authority's request which was minuted in the 10 July 2007 letter was the ultimate lackadaisical act/conduct that summed up the breach of the best endeavour clause, ergo, in this circumstance, the date of the breach was on 10 July 2007; (d) there was a gap of more than 10 years between the date when the SPA 2006 was executed and the date of the COA's decision during which the market value of the said property would have appreciated significantly, therefore, if the court accepted the plaintiff's contention, it would surely cause gross injustice against the first defendant; and (e) the said property was sold to the second defendant in 2012 ie after more than six years from the date of the execution of SPA 2006 (see para 41).

(3) Clause 9 of the SPA 2006 would only entitle the plaintiff to claim specific performance. Nonetheless, upon the intervention and eminent ruling of the COA, the plaintiff was granted damages in lieu of specific performance. Thus, it could no longer be said that the plaintiff's entitlement for damages stemmed from any clause of the SPA 2006. Instead, the plaintiff's entitlement for damages was granted vide the COA's order (and not by any election under cl 9 of the SPA 2006) (see para 47).

(4) The court opined that just because there was no valuation report to show the market value of the said property on 10 July 2007, it did not mean that there was no evidence to ascertain the market value of the said property. The law was trite that the court's power to award and to assess damages was a discretionary one. It was also trite that this discretionary power must be judicially exercised by the court. As an aid to justice the court was empowered to consider the surrounding facts of the case to assess the damages suffered by the plaintiff arising from the first defendant's breach (see para 49).

(5) Even without having the benefit of a valuation report to show the market value of the property as at 10 July 2007, an approximate market value could be ascertained by considering the values, and dates of the transaction, as well as the time in between the transactions of the said property between the parties. The purchase price of the property under the SPA 2006 was RM650,000 whereas under the SPA 2012, the price was RM1,430,000, hence, the difference in value of the said property was RM780,000. When the said difference in value was divided by six ie the time lapse between the two SPAs, the average annual appreciation was 20% ie RM130,000. Therefore, the estimated market value of the property as of 10 July 2007 was RM650,000 plus 20% ie RM130,000 equaled to RM780,000 (see para 51).

(6) Based on the normal measure of damage in contracts for the sale of immoveable property, the plaintiff's damages would supposedly be the market value at the date of breach less the contract price, therefore, the plaintiff's damages would be RM130,000. Nonetheless, the court was minded that this general measure would turn a blind eye to two distinct principles and two distinct profits which both the plaintiff and the first defendant had garnered from the facts of the present case. Firstly, it was trite and immovable that no party ought to be allowed to reap benefit from its own delinquent breach against a contract. Secondly, the court must uphold the principle that no party should be allowed to sit on his rights and not act to mitigate his losses. Thus, these principles and these facts clearly distinguished the present case from the normal measure of damages in cases of sale of immovable property (see paras 52–53 & 55–56).

(7) In the present case, the calculation of damages was as followed: (a) RM780,000 minus RM200,800 (the plaintiff's profits in subletting the property) equaled to RM579,200; (b) as the first defendant had been deprived off the benefit or did not receive benefit of the full purchase price of RM650,000 for a period six years, therefore, the net profit sum of RM579,200 shall be equally shared between the plaintiff and the first defendant ie RM579,200 divided into two equaled to RM289,600; and

(c) the court therefore assessed that the sum of RM289,600 was the just and reasonable damages that should be awarded to the plaintiff (see para 63).

(8) Regarding the RM65,000 deposit payment issue, since the plaintiff had initially returned the deposit refund sum (via a cheque dated 2 September 2016 at the sum of RM69,220.97 issued by the first defendant) to the first defendant, thus, the same amount of RM69,220.97 shall be paid or returned to the plaintiff. Further, the court ordered that the amount of RM289,600 shall be paid to the plaintiff with an interest of 5%pa from the date of judgment until full realization thereof. The court also ordered that there would be no order as to cost for this assessment of damages proceeding. Parties must therefore bore their own costs (see paras 64–66).

[Bahasa Malaysia summary

Defendan pertama sebagai pemilik hartanah yang terletak di Kuala Lumpur ('hartanah tersebut') telah memeterai perjanjian jual beli ('SPA 2006') bagi hartanah tersebut dengan plaintif dan sementara menunggu penyempurnaan pembelian tersebut, dengan persetujuan defendan pertama, plaintif telah mengambil milikan hartanah tersebut. Bagaimanapun, penjualan hartanah tersebut tidak menjadi kenyataan kerana persetujuan Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur ('JKT') tidak diperolehi. Walaupun SPA 2006 tersebut tidak diselesaikan, plaintif tetap terus mengekalkan pemilikan hartanah tersebut selepas membuat pembayaran sewa. Selepas itu, defendan pertama telah memeterai perjanjian jual beli hartanah dengan defendan kedua ('SPA 2012') dan transaksi ini berjaya kerana defendan kedua telah didaftarkan sebagai pemilik berdaftar hartanah tersebut. Tidak berpuas hati dengan tindakan defendan-defendan, plaintif telah memfailkan tindakan terhadap mereka berdasarkan hujah bahawa SPA 2006 masih boleh dikuatkuasakan dan belum ditamatkan dan bahawa defendan pertama telah gagal memenuhi kewajipannya iaitu menggunakan atau melaksanakan ikhtiar dan usaha yang terbaik untuk mendapatkan persetujuan JKT. Mahkamah Tinggi ('MT') bersetuju dengan plaintif dan membenarkan pelaksanaan spesifik SPA 2006. Semasa rayuan, Mahkamah Rayuan ('MR') mengubah perintah MT di mana MR telah mengarahkan ganti rugi diberikan kepada plaintif sebagai pengganti pelaksanaan spesifik yang akan dinilai oleh hakim MT ('HMT'). Mahkamah Rayuan juga telah memerintahkan defendan pertama membayar balik deposit yang telah dibayar oleh plaintif di bawah SPA 2006 berserta faedah penghakiman sebanyak 5% setahun dari tarikh penghakiman Mahkamah Tinggi. Tindakan semasa adalah berkaitan dengan penilaian ganti rugi. Dengan bergantung pada laporan penilaian bertarikh 28 Mac 2018, plaintif menuntut jumlah RM1.25 juta sebagai ganti rugi bagi pelanggaran kewajipan defendan pertama untuk bertindak atas klausa ikhtiar dan usaha terbaik di bawah SPA 2006. Plaintif menegaskan bahawa tarikh pelanggaran adalah tarikh MR memberikan penghakiman iaitu pada 28 Julai

2017 manakala defendan pertama berhujah bahawa tarikh pelanggaran ialah tarikh defendan pertama gagal mengemukakan surat yang diminta oleh Pihak Berkuasa Negeri melalui surat bertarikh 10 Julai 2007.

Diputuskan:

(1) Undang-undang adalah mantap bahawa plaintif sebagai pihak yang membuat tuntutan menanggung beban undang-undang untuk membuktikan bahawa dia sebenarnya telah mengalami kerugian akibat pelanggaran defendan pertama. Sebagai peraturan am, dalam kes pelanggaran kontrak, ganti rugi hendaklah dinilai pada tarikh pelanggaran. Dalam kes ini, kontrak yang dibuat antara plaintif dan defendan pertama ialah kontrak untuk penjualan harta tak alih (lihat perenggan 33 & 36).

(2) Adalah tidak betul untuk plaintif mengambil tarikh keputusan MR sebagai tarikh pelanggaran atau tarikh kerugian kontrak tersebut kerana: (a) Mahkamah Rayuan tidak membuat keputusan sedemikian; (b) keputusan MR pada asasnya menyokong dapatan fakta HMT bahawa defendan pertama telah melanggar SPA 2006 apabila ia tidak bertindak mengikut klausa usaha terbaik, oleh itu, plaintif tidak boleh menganggap bahawa penggantian perintah pelaksanaan spesifik kepada penganugerahan ganti rugi sebagai tarikh akhir untuk tidak memberikan pelaksanaan spesifik yang melayakkan plaintif mengambil tarikh penghakiman MR untuk mengira ganti ruginya; (c) kegagalan defendan pertama untuk menjawab permintaan Pihak Berkuasa Negeri yang telah diminitkan dalam surat bertarikh 10 Julai 2007 adalah tindakan/kelakuan yang tidak bertanggungjawab yang merumuskan pelanggaran klausa usaha terbaik, oleh itu, dalam keadaan ini, tarikh pelanggaran adalah pada 10 Julai 2007; (d) terdapat jurang lebih daripada 10 tahun antara tarikh SPA 2006 ditandatangani dan tarikh keputusan MR di mana nilai pasaran hartanah tersebut akan meningkat dengan ketara dalam tempoh ini, oleh itu, jika mahkamah menerima hujahan plaintif, ia pasti akan menyebabkan ketidakadilan yang teruk terhadap defendan pertama; dan (e) hartanah tersebut telah dijual kepada defendan kedua pada tahun 2012 iaitu selepas lebih daripada enam tahun dari tarikh SPA 2006 ditandatangani (lihat perenggan 41).

(3) Klausa 9 SPA 2006 hanya melayakkan plaintif menuntut pelaksanaan spesifik. Walau bagaimanapun, selepas campur tangan dan keputusan MR, plaintif telah diberikan ganti rugi sebagai ganti pelaksanaan spesifik. Oleh itu, ia tidak lagi boleh dikatakan bahawa kelayakan plaintif untuk ganti rugi berpunca daripada mana-mana klausa SPA 2006. Sebaliknya, kelayakan plaintif untuk ganti rugi telah diberikan mengikut perintah MR (dan bukan oleh mana-mana pilihan di bawah klausa 9 SPA 2006) (lihat perenggan 47).

(4) Mahkamah berpendapat hanya kerana tiada laporan penilaian yang menunjukkan nilai pasaran hartanah tersebut pada 10 Julai 2007, ia tidak bermakna tiada keterangan untuk memastikan nilai pasaran hartanah tersebut. Undang-undang adalah mantap bahawa kuasa mahkamah untuk memberi award dan menilai ganti rugi adalah mengikut budi bicara. Ia juga merupakan undang-undang yang mantap bahawa kuasa budi bicara ini mesti dilaksanakan secara adil oleh mahkamah. Sebagai bantuan kepada keadilan mahkamah diberi kuasa untuk mempertimbangkan fakta sekeliling kes untuk menilai ganti rugi yang dialami oleh plaintif yang timbul daripada pelanggaran defendan pertama (lihat perenggan 49).

(5) Walaupun tanpa laporan penilaian untuk menunjukkan nilai pasaran hartanah tersebut pada 10 Julai 2007, anggaran nilai pasaran boleh dipastikan dengan mengambil kira nilai, dan tarikh transaksi, serta masa diantara transaksi tersebut antara pihak-pihak. Harga belian hartanah tersebut di bawah SPA 2006 ialah RM650,000 manakala di bawah SPA 2012, harganya ialah RM1,430,000, maka perbezaan nilai hartanah tersebut ialah RM780,000. Apabila perbezaan nilai tersebut dibahagikan dengan enam iaitu selang masa antara kedua-dua SPA tersebut, purata peningkatan tahunan ialah 20% iaitu RM130,000. Oleh itu, anggaran nilai pasaran hartanah tersebut pada 10 Julai 2007 ialah RM650,000 ditambah dengan 20% iaitu RM130,000 bersamaan dengan RM780,000 (lihat perenggan 51).

(6) Berdasarkan penilaian biasa kerugian dalam kontrak untuk penjualan harta tak alih, ganti rugi plaintif sepatutnya adalah nilai pasaran pada tarikh pelanggaran tolak harga kontrak, oleh itu, ganti rugi plaintif ialah RM130,000. Walau bagaimanapun, mahkamah berpendapat bahawa penilaian am ini tidak terpakai kepada dua prinsip yang berbeza dan dua keuntungan berbeza yang kedua-dua plaintif dan defendan pertama telah perolehi daripada fakta kes ini. Pertama, sudah menjadi undang-undang yang mantap dan tidak boleh diubah bahawa tiada pihak dibenarkan untuk mendapat faedah daripada pelanggarannya sendiri terhadap sesuatu kontrak. Kedua, mahkamah mesti berpegang kepada prinsip bahawa tiada pihak dibenarkan untuk berdiam diri terhadap haknya dan tidak bertindak untuk mengurangkan kerugiannya. Oleh itu, prinsip dan fakta ini dengan jelas membezakan kes ini daripada penilaian biasa ganti rugi dalam kes penjualan harta tak alih (lihat perenggan 52–53 & 55–56).

(7) Dalam kes ini, pengiraan ganti rugi adalah seperti berikut: (a) RM780,000 tolak RM200,800 (keuntungan plaintif dalam menyewakan hartanah tersebut) bersamaan dengan RM579,200; (b) memandangkan defendan pertama telah dihalang daripada menerima faedahnya atau tidak menerima faedah harga pembelian penuh

RM650,000 untuk tempoh enam tahun, oleh itu, jumlah keuntungan bersih RM579,200 hendaklah dikongsi sama rata antara plaintif dan defendan pertama iaitu RM579,200 dibahagikan kepada dua bersamaan dengan RM289,600; dan (c) oleh itu mahkamah menilai bahawa jumlah RM289,600 adalah ganti rugi yang adil dan munasabah yang patut diberikan kepada plaintif (lihat perenggan 63).

(8) Berkenaan isu bayaran deposit RM65,000, memandangkan plaintif pada mulanya telah memulangkan jumlah bayaran balik deposit (melalui cek bertarikh 2 September 2016 berjumlah RM69,220.97 yang dikeluarkan oleh defendan pertama) kepada defendan pertama, oleh itu, jumlah yang sama sebanyak RM69,220.97 hendaklah dibayar atau dikembalikan kepada plaintif. Selanjutnya, mahkamah memerintahkan bahawa jumlah RM289,600 hendaklah dibayar kepada plaintif dengan faedah 5% setahun dari tarikh penghakiman sehingga realisasi penuh. Mahkamah juga memerintahkan bahawa tidak ada perintah mengenai kos untuk prosiding penilaian ganti rugi ini. Oleh itu, pihak-pihak mesti menanggung kos masing-masing (lihat perenggan 64–66).]

Cases referred to

Bank Simpanan Nasional v Rudysham bin Abdul Raof [2016] MLJU 909, HC (refd)

Bekalan Sains P & C Sdn Bhd v Bank Bumiputra Malaysia Bhd [2011] 5 MLJ 1; [2011] 1 LNS 232, CA (refd)

Bonham Carter v Hyde Park Hotel Ltd (1948) 64 TLR 177, KBD (refd)

Bukit Unggul Golf and Country Resort Sdn Bhd v Bukit Ringgit Holdings Sdn Bhd [2016] MLJU 1166; [2017] 4 CLJ 639, CA (refd)

Central Malaysia Development Co Ltd v Chin Pak Chin [1967] 2 MLJ 174 (folld)

Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd [2019] 6 MLJ 15; [2019] 2 CLJ 723, FC (refd)

Datuk Mohd Ali bin Hj Abdul Majid & Anor (both practicing as Messr Mohd Ali & Co) v Public Bank Bhd [2014] 4 MLJ 465, FC (refd)

Diamond v Campbell-Jones and Others [1961] 1 Ch 22 (refd)

Eikobina (M) Sdn Bhd v Mensa Mercantile (Far East) Pte Ltd [1994] 1 MLJ 553, SC (refd)

Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd [1970] 1 All ER 225, CA (refd)

Hock Huat Iron Foundry (Suing As A Firm) v Naga Tembaga Sdn Bhd [1999] 1 MLJ 65, CA (refd)

Johnson & Anor v Agnew [1980] AC 367, HL (refd)

Lee Sau Kong v Leow Cheng Chiang [1961] 1 MLJ 17, CA (refd)

Livingstone v Raywards Coal Co (1880) 5 App Cas 25, HL (refd)

Miliangos v George Frank (Textiles) Ltd [1975] 3 All ER 801, HL (refd)

Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd [1999] 3 MLJ 489, CA (refd)
Popular Industries Ltd v The Eastern Garment Manufacturing Co Sdn Bhd [1989] 3 MLJ 360; [1990] 2 CLJ Rep 635, HC (refd)
Tan Ah Chio & Ors v Lua Kim Soon & Ors [2015] 1 MLJ 334; [2014] 1 LNS 1004, CA (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777; [1995] 1 CLJ 15, FC (refd)
Terang Tanah Sdn Bhd & Anor v Chong Choy Lin [2014] 5 MLJ 594, CA (refd)

Harpal Singh (Reny Rao with him) (BB Teh) for the plaintiff.
Caryn Shua (Sam Tong with her) (Richard Tee & Chin) for the first defendant.

Azimah Omar J:

INTRODUCTION

[1] This is an appeal filed by the plaintiff against this court's award of damages following an assessment of damages carried out on 28 June 2021.

THE BACKGROUND FACTS

[2] To have a better understanding and to fully appraise the issues relating to the award of damages, it is necessary for this court to set out the factual background of this case which has led to the assessment of damages. The facts are as follows:

(a) the plaintiff (Lim Chong Yean) had filed a writ action against the first defendant (Koperasi Pegawai Hutan Melayu) and the second defendant (Khong Yoke Bee) claiming, inter alia; for specific performance of a sale and purchase agreement ('SPA 2006') dated 7 November 2006 between the first defendant as the seller and the plaintiff as the purchaser of a property held under PN 29830, Lot No 45478, Mukim Batu, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan ('the said property') at the purchase price of RM650,000;

(b) pursuant to the SPA 2006, the plaintiff had paid a deposit of RM65,000 to the first defendant which was 10% of the purchase price;

(c) it was a term and condition of the SPA 2006 that the transfer of the property was subject to the consent of the Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur ('JKT');

(d) subsequent to the signing of the SPA 2006 and pending the completion of the SPA 2006, the plaintiff had taken possession of the said property with the agreement of the first defendant because the plaintiff was in need of a place to put up his workers and use the said property as his store;

(e) however, the sale of the said property did not materialise as the consent of the JKT was not obtained wherein by a letter dated 19 January 2007, JKT informed the first defendant that the transfer was not approved;

(f) although the SPA 2006 was not completed, the plaintiff continued to retain possession of the said property upon payment of rental at RM600 per month which was later increased to RM1,000 per month from November 2012 until August 2013;

(g) having occupied the said property since the signing of the SPA 2006 and continued to occupy the said property despite not obtaining the approval from the authority to complete the sale, the plaintiff had asserted that on September 2012 he had paid the quit rent, the assessment rate, and the Indah Water bill due over the said property as requested by the first defendant;

(h) on 2012, the first defendant by a sale and purchase agreement dated 27 November 2012 ('SPA 2012') had sold the said property to the second defendant at the price of RM1,430,000;

(i) on 22 August 2013, the second defendant was successfully registered as the registered proprietor of the said property;

(j) when the plaintiff came to know that the second defendant had purchased the said property and thereafter successfully registered the said property under her name, the plaintiff (on the premise that there exists a legitimate expectation that SPA 2006 will be fully executed and the first defendant would fulfill its obligations under the said SPA 2006) asserts that the first defendant had in bad faith (mala fide) sold the said property to the second defendant at the price of RM1,430,000; and

(k) standing on the footing that the SPA 2006 is still enforceable and has not been terminated and that the first defendant has failed to fulfill its obligations namely; to use or to exercise its best endeavours and efforts to obtain the consent of the JKT, the plaintiff had initiated this writ action against the first and second defendants.

The full trial in the High Court

[3] At the end of the full trial, on 18 May 2015, the High Court judge ('HCJ') allowed the plaintiff's claim for an order for specific performance of the said SPA and held that the first defendant failed to fulfill its obligation under cl 3.2 SPA to use its best endeavours and efforts in obtaining the approval/consent of the JKT.

[4] The first and the second defendants who were not satisfied with the HCJ's decision, had filed their notices of appeal to the Court of Appeal appealing against the said decision.

The appeal in the Court of Appeal

[5] On 28 July 2016, the Court of Appeal agreed with the decision of the HCJ pertaining to the issue of best endeavours and efforts, but nonetheless had allowed the appeal in part. The Court of Appeal had varied the order for specific performance made by the learned High Court in that the Court of Appeal has ordered damages to be awarded to the plaintiff in lieu of specific performance to be assessed by the High Court judge. The Court of Appeal had also ordered the first defendant to refund the deposit paid by the plaintiff under the SPA 2006 together with judgment interest of 5%pa from the date of the judgment of the High Court.

ASSESSMENT OF DAMAGES PROCEEDINGS

[6] Pursuant to the Court of Appeal's order dated 28 July 2016, on 21 February 2018, the plaintiff filed a notice of appointment of assessment of damages under O 37 r 1 of the Rules of Court 2012 ('ROC 2012') against the first defendant.

[7] The plaintiff and the first defendant had mutually agreed that the assessment of damages proceeding to be conducted by way of affidavit evidence.

[8] The following affidavits were filed by the plaintiff and the first defendant in the assessment of damages proceeding.

The plaintiff's affidavits

(a) affidavit in support affirmed by Lim Chong Yean on 10 September 2019 (encl 140);

(b) affidavit affirmed by Syamzul Bahari bin Saupi (registered valuer) on 10 September 2019 (encl 141);

(c) plaintiff's affidavit in reply to the first defendant's affidavit affirmed by Lim Chong Yean on 15 October 2019 (encl 146);

(d) further affidavit in reply affirmed by Lim Chong Yean on 29 June 2020 (encl 154); and

(e) affidavit 2 affirmed by Syamzul Bahari bin Saupi (registered valuer) on 29 June 2020 (encl 155).

The first defendant's affidavits

a) the first defendant's affidavit in reply affirmed by Aminuddin bin Zainudin and Khairi bin Mohd Ariffin (members of the Board of Directors of the first defendant) on 8 October 2019 (encl 144);

b) the first defendant's affidavit in reply affirmed by Aminuddin bin Zainudin and Khairi bin Mohd Ariffin (members of the Board of Directors of the first defendant) on 8 October 2019 (encl 145); and

c) further affidavit affirmed by Abdul Rahman bin Ngatenan @ Adnan (administrator of the first defendant) on 17 September 2020 (encl 157).

THE PRINCIPLE OF LAW RELATING ASSESSMENT OF DAMAGES

[9] Before this court proceeds to determine or assess the just and appropriate quantum of damages to be awarded to the plaintiff, it is germane for this court to briefly lay out the well-established principle of law relating to assessment of damages.

[10] The law is trite that the court's power to award and to assess damages is a discretionary one. It is also trite that this discretionary power must be judicially exercised by the court.

[11] The term damages has been defined in *Pollock & Mulla (Indian Contract and Specific Relief)* as:

> the pecuniary recompense given by process of law to a person for the actionable wrong that another has done him.

[12] It is a well-established general principle of law of that the primary purpose of awarding damages is to compensate the claimant or the aggrieved party for the losses, damage, and injury suffered occasioned by the delinquent party in breach (in cases of contract) or the tortfeasor in cases for tortious liability.

[13] The function in awarding damages to an injured party was explicitly explained by Lord Blackburn in the case *Livingstone v Raywards Coal Co* (1880) 5 App Cas 25 where he stated:

> I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at *that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation*. (Emphasis added.)

[14] Widgery LJ in the case of *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 All ER 225 had further elaborated on the purpose of the award of damages by stating as follows:

> Each and every case depends on its own facts. It being remembered, *first, that the*

purpose of the award of damages is to restore the plaintiff to his position before the loss occurred or damage caused and secondly, that the plaintiff must act reasonably to mitigate his loss. If the article damaged is a motor car or popular make, the plaintiff cannot charge the defendant with the cost of repair when it is cheaper to buy a similar car in the market. On the other hand, if no substitute for the damaged articles is available and no reasonable alternative can be provided, the plaintiff should be entitled to the cost of repair in the eye of law. (Emphasis added.)

[15] The general and basic principle in assessment of damages propounded by Lord Blackburn in the case of *Livingstone* was applied by our Federal Court in the case of *Datuk Mohd Ali bin Hj Abdul Majid & Anor (both practicing as Messr Mohd Ali & Co) v Public Bank Bhd* [2014] 4 MLJ 465.

(See also: *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777)

[16] The function of awarding damages to an aggrieved party was further explained by Abdul Malik Ishak, JCA in the case of *Bekalan Sains P & C Sdn Bhd v Bank Bumiputra Malaysia Bhd* [2011] 5 MLJ 1; [2011] 1 LNS 232 wherein he stated:

The primary purpose of awarding damages is to compensate the aggrieved party for the harm done to him. Whereas the secondary purpose is to punish the wrongdoer and this is done by imposing what is known as exemplary damages or punitive damages or vindictive damages or retributory damages.

[17] It is also trite that the onus to prove loss or damage lies on the claimant. Thomson CJ in the case of *Lee Sau Kong v Leow Cheng Chiang* [1961] 1 MLJ 17 in dealing with general damages in the sense of loss of business and profits had held:

With regard to the claim for damages, I would preface what I have to say by quoting the following passage ... 'Plaintiff must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write it down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it.

[18] The oft quoted words of Lord Goddard in the case of *Bonham Carter v Hyde Park Hotel Ltd* (1948) 64 TLR 177 emphasises that a claimant must prove his loss:

Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it.

(See: *Tan Ah Chio & Ors v Lua Kim Soon & Ors* [2015] 1 MLJ 334; [2014] 1 LNS 1004 (CA) ... It is trite law that a party claiming damages must prove actual losses suffered and that the losses suffered were caused by the opposing party's breach.)

[19] In the case of *Hock Huat Iron Foundry (Suing As A Firm) v Naga Tembaga Sdn Bhd* [1999] 1 MLJ 65 Abdul Malek Ahmad JCA (as he then was) held:

> When damage is shown but the amount is not proved, the court will usually award nominal damages. The trial judge was correct in concluding that the loss had not been proved sufficiently by the defendant and was right in giving judgment for RM10 as nominal damages for the loss of interest on project investment and loss of income on investment.

[20] In *Bukit Unggul Golf and Country Resort Sdn Bhd v Bukit Ringgit Holdings Sdn Bhd* [2016] MLJU 1166; [2017] 4 CLJ 639, the Court of Appeal has held that:

> [94] In addition, on the question of the correct assessment date in law for damages in lieu of specific performance it must be noted that it is not always necessary it is at the date of judgment. There could be different dates for the assessment of damages and this is best explained in the House of Lords case of *Johnson v Agnew* [1980] AC 397 where it is said:
>
> > The general principle for the assessment of damages is compensatory, ie. that the innocent party is to be placed, so far as money can do so. In the same position as if the contract had been performed. *Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach* — a principle recognised and embodied in section 51 of the Sale of Goods Act 1893. But this is not an absolute rule: if follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances. (Emphasis added.)
>
> [95] Also in the case of Johnson Ong Seok Heng mentioned earlier where Mohamed Dzaidin J (as he then was) elaborated:
>
> > This means the market value is to be assessed as at the time when the breach occurred. However, there are cases where the Courts had determined the market value of the property on some other dates, eg, the date of judgment. In *Cheng Chuan Development Sdn Bhd v Ng Ah Hock* [1982] 2 MLJ 222; [1982] 1 LNS 48, the Federal Court, affirming the decision of the trial Judge, assessed damages to be the difference between the contract price and the price at which the shophouse was sold to the third party. In *Tan Geok Khoon & Anor v Paya Terubong Est Sdn Bhd* (Penang High Court Civil Suit No 831 of 1984), Datuk Edgar Joseph Jr J held that the relevant date for assessment of damages would be the date of judgment especially since there was no evidence that they would be the greater if assessed at the date of breach. In *Johnson v Agnew* [1980] AC 367, the House of Lords held that the date of assessment of damages for claim of

> specific performance should be that at the date when the contract was lost which would be the date of the hearing of the specific performance. (Emphasis added.)

(See also: (a) *Popular Industries Ltd v The Eastern Garment Manufacturing Co Sdn Bhd* [1989] 3 MLJ 360; [1990] 2 CLJ Rep 635; and (b) *Terang Tanah Sdn Bhd & Anor v Chong Choy Lin* [2014] 5 MLJ 594).

[21] As general rule, damages should be assessed as at the date of breach. This principle has been laid down by the House of Lords in the case of *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801. However, the House of Lords had also foresaw that in certain cases that this general may not be applicable if it occasions an injustice against parties. Therefore, in appropriate cases, courts may choose some other date to assess the damages as the function or purpose of awarding damages is to compensate the injured party and not to punish them. The view expressed in *Milangos* was endorsed by the House of Lords in the case of *Johnson & Anor v Agnew* [1980] AC 367 wherein the House of Lords (Lord Wilberforce) stated:

> that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. *Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach* ... But this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances. (Emphasis added.)

(See also: *Eikobina (M) Sdn Bhd v Mensa Mercantile (Far East) Pte Ltd* [1994] 1 MLJ 553 (SC)).

[22] There is also a principle that in awarding damages, the plaintiff should not be allowed to profit from it. The Federal Court in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15 has eminently held that:

> In considering the overall position of the purchaser, the Court should not wear blinkers and ignore the fact that the purchaser stands to make a substantial profit on the price increase of the land in question because of the breach of contract, which should therefore be deducted from the loss of profits. Not to do so would be to put the purchaser in a better position that it would have been in if the contract had been performed in 1988. Further, to countenance such a claim by the purchaser would amount to countenancing a claim for double recovery.

[23] Having dealt with the relevant laws relating to damages, this court will now proceed to determine the appropriate quantum of damages that should be awarded to the plaintiff.

A THE PLAINTIFF'S CLAIM/THE SUBMISSION OF THE PLAINTIFF'S COUNSEL

[24] The plaintiff claims the sum of RM1,250,000 being damages for the first defendant's breach of duty to act on the best endeavours and efforts clause under the SPA 2006.

[25] In support of his claim for the RM1.25m, the plaintiff had tendered and wholly relied on a valuation report ('VR') dated 28 March 2018 prepared by a valuer by the name Sr Syamzul Bahari bin Saupi (Qaiser Harta Sdn Bhd)) who had assessed or valued that (as at 28 July 2016) the market value of the said property was at RM1,900,000. It must be noted that the date 28 July 2016 was the date when the Court of Appeal heard the defendants' appeals and delivered its judgment.

[26] It was submitted by the counsel for the plaintiff in the present case, that the HCJ had in 2015 granted the plaintiff an order for specific performance of the SPA 2006, however only upon appeal to the Court of Appeal that the Court of Appeal had varied that the specific performance order to an award of damages. Placing a heavy reliance on Justice Gill's approach in the case of *Central Malaysia Development Co Ltd v Chin Pak Chin* [1967] 2 MLJ 174, the plaintiff's counsel submitted that considering that the plaintiff (in finality) had been deprived of the ownership over the said property when the order for specific performance was substituted to an order for damages, thus, the date in assessing the plaintiff's damages should be based on the market value of the said property on 28 July 2016 (ie the date of the Court of Appeal's order to 'relinquish' the plaintiff's beneficial hold of the said property which would be compensated with damages in monies)

[27] On this narrative, the counsel for the plaintiff contended that the date of breach in this case was on the date of the Court of Appeal's order wherein the plaintiff had, in finality lost the opportunity and contract to purchase the said property.

[28] By applying the approach taken by Gill J in the case of *Central Malaysia Development Co Ltd*, the counsel for the plaintiff submits that the plaintiff's measure of damages should be the market value of the said property (on the date that the Court of Appeal substituted the specific performance order for damages) less the contract price. The plaintiff's counsel has calculated the damages in a simple mathematical calculation as follows:

(a) the market value of the said property on 28 July 2016 was at RM1,900,00;

(b) the purchase price of the said property under the SPA 2006 was RM650,000; and

(c) therefore, the damages suffered by the plaintiff is RM1,900,000 less RM650,000 ie *RM1,250,000*.

The plaintiff had also referred to the English case of *Diamond v Campbell-Jones and Others* [1961] 1 Ch 22 in supporting its contention.

[29] It was contended by the counsel for the plaintiff that the damages in the sum of RM1,250,000 claimed by the plaintiff is a just and reasonable amount as the plaintiff had lost the opportunity of owning the said property resulting from the first defendant's breach.

[30] The plaintiff's counsel had also informed this court that the first defendant has yet to return to the plaintiff the deposit sum of RM65,000 together with the interest to the plaintiff as ordered by the Court of Appeal.

The first defendant's opposition / the submission of the first defendant's counsel

[31] The first defendant had vehemently disputed the damages of RM1,250,000 claimed by the plaintiff. The first defendant submits that the plaintiff has no basis to claim for RM1.25m in damages and that the said sum is clearly excessive and grossly unreasonable.

[32] In dismantling the quantum of damages claimed by the plaintiff, the counsel for the first defendant had submitted a four-pronged argument:

(a) the plaintiff failed to prove actual loss.

It was submitted by the first defendant's counsel that the plaintiff had not produced any sufficient and credible evidence to prove that he had actually suffered loss of RM1.25m as a result the first defendant's breach of obligation to use its best endeavours and efforts to secure the consent from the state authority to complete SPA 2006;

According to the first defendant's counsel, the plaintiff in claiming damages in the sum of RM1.25m had solely relied on the valuation report prepared by Sr Syamzul Bahari which had determined the market value of the said property on 28 July 2016 at RM1.9m. By taking the market value of the property on 28 July 2016, the plaintiff had calculated his loss suffered at RM1.25m being the differential sum between the market value and purchase price of the said property. The first defendant's counsel further submits that the plaintiff cannot simply rely on the said valuation report and claimed that he had suffered the

RM1.25m in damages. Apart from the valuation report, there is no other evidence tendered by the plaintiff to prove that he has in fact suffered damages arising from the breach. Therefore, the first defendant's counsel submitted that since the plaintiff had failed to prove the actual loss suffered by him, the plaintiff is only entitled to nominal damages.

(b) the valuation report (VR) prepared by Sr Syamzul dated 28 March 2018 cannot form the basis for the purpose of quantifying the actual loss suffered by the plaintiff

The first defendant's counsel argued that the VR prepared by Sr Syamzul dated 28 March 2018 (which had assessed the market value of the said property on the date of the Court of Appeal's order) cannot form the basis in determining the actual loss suffered by the plaintiff arising from the first defendant's breach of the SPA 2006.

The first defendant's counsel submits that the plaintiff's contention that the date of breach of the SPA 2006 was on the date of the Court of Appeal handed down its judgment ie 28 July 2016 is unfounded on these following reasons;

(i) the Court of Appeal did not make any order or ruling that the date the breach occurs from its order;

(ii) the Court of Appeal was in agreement with the HCJ that the first defendant was in breach of the SPA 2006 for delaying in its application to obtain consent from the authority and had not used its best endeavours and effort to obtain the same. Therefore, the date of breach of the SPA 2006 was at the date when the first defendant failed to submit the letter requested by the state authority vide a letter dated 10 July 2007. Applying the House of Lords' decision in the case of *Johnson & Anor v Agnew* [1980] AC 367, the first defendant's counsel submits that the assessment of damages for a claim of specific performance should start from the date when the contract is lost ie at the date of the breach. The date of breach or the date contract was lost in this case was on 10 July 2007 and not 28 July 2016.

It was further submitted by the counsel for the first defendant that since the plaintiff had maintained a position that the date of breach was on 28 July 2016 and had only relied on the on valuation report by Sr Syamzul (which had determined the market value of the said property at the date of the Court of Appeal's order on 28 July 2016), the plaintiff had therefore failed to produce any evidence to prove the market value of the said property as at 10 July 2007 (the date when the SPA 2006 was breached by the first defendant).

That being the position, it was further argued that the plaintiff had not adduced sufficient evidence to prove that he had actually suffered losses amounting to RM1.25m. In this circumstance, the first defendant's counsel argued that the plaintiff is only entitled to nominal damages.

(c) the plaintiff is not entitled to damages of RM1.25m as claimed as he is only eligible to claim for the agreed liquidated damages pursuant to cl 9 of SPA 2006.

The counsel for the first defendant submitted that the SPA 2006 contained an agreed liquidated damages clause in the event of breach. Clause 9 of SPA 2006 reads:

> DEFAULT BY THE VENDOR
>
> In the event the Vendor shall default or willfully refuse to complete the sale herein and if the Purchaser shall perform and observe its obligations and liabilities hereinunder on its part to be performed and observed the Purchaser shall be entitled to Specific Performance of this Agreement and all costs thereby incurred shall be borne by the Vendor on a solicitor and client basis OR the Purchaser shall have the option to terminate this Agreement and the Vendor shall, within seven (7) days of receiving the Purchaser's Solicitors' notice of the Purchaser's intention to terminate this Agreement, refund all monies paid (together with interest accrued thereon) by the Purchaser to the Vendor and a further sum equivalent to the deposit sum and all monies paid by the Purchaser to the Vendor, as agreed liquidated damages. In the event the Vendor fails to refund the monies paid by the Purchaser together with the agreed liquidated damages within the time period abovementioned, the Vendor shall pay the Purchaser interest at the rate of eight per centum (8%) per annum calculated on a daily basis on the sum remaining unpaid.

According to counsel, this cl 9 is an agreed liquidated damages clause which has clearly stipulated that a specific sum is to be paid upon breach of the SPA. Therefore, under this cl 9, the plaintiff is only entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven, ie the sum of RM69,220.97 being the 10% deposit paid together with the 5 % interest calculated from the date of High Court judgment dated 18 May 2015 until 2 September 2016 as ordered by the Court of Appeal vide order dated 28 July 2016.

In this regard, the first defendant's counsel had urged this court to adopt the decision of the Federal Court in the case of *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15; [2019] 2 CLJ 723.

(d) on the facts and circumstances surrounding this case, the plaintiff does not suffer any losses at all:

(i) it was submitted by the first defendant's counsel that the plaintiff here had not suffered any loss. Under the SPA 2006, the plaintiff had only paid a deposit sum of RM65,000. Although the consent to transfer was not obtained from JKT or the State Authority, soon after the SPA was executed the plaintiff was already allowed by the first defendant to occupy the said property.

The plaintiff had only started paying rentals for the said property in May 2009 with a very low monthly rental at RM600. The monthly rental of RM600 had continued for three years. The rental was later increased to RM1000 since November 2012.

However, without the knowledge of the first defendant, the plaintiff has sublet the whole four stories building (the said property) to one New Soon Yee Fruits Sdn Bhd for a rental sum of RM7,000 per month since January 2009 until August 2013.

(ii) the first defendant's counsel submitted that the plaintiff was earning RM6000 plus monthly from the collection of rentals paid by New Soon Yee Fruits Sdn Bhd from January 2009 to August 2013 which comes out to RM200,800.

According to the counsel for the first defendant, ever since the execution of SPA 2006, the plaintiff has enjoyed all the benefits from the occupation in the said property and the collection of rentals more than seven times than what he has paid to the first defendant despite the fact that the plaintiff was never the owner of the said property (and has never paid the 90% balance purchase price for the said property). In this instance, the first defendant's counsel contended that in actual fact, the plaintiff did not suffer any loss and damages as a result of the first defendant's breach. The counsel further contends that Plaintiff here was clearly unjustly enriched. He therefore, is not entitled to any amount of damages.

The deposit in the sum of RM65, 000 which is allegedly not paid by the first defendant

[33] Regarding the plaintiff's allegation that the first defendant had not returned the deposit sum of RM65,000 to the plaintiff, the first defendant contends that (via the first defendant's counsel's letter dated 2 September 2016) the first defendant had already issued a cheque with the sum of RM69,220.97 (RM65,000 deposit + RM4220.97 interest at 5%) to the plaintiff. The plaintiff

had however refused to accept the cheque and returned it to the first defendant on or around 7 September 2016 on the ground that a notice of motion for leave to appeal to the Federal Court had been filed.

[34] As a matter of fact, according to the first defendant's counsel, in the year 2013, the first defendant through its counsel (Messrs TA Fadzil, Hairul and Associates) had made several attempts to return the deposit sum to the plaintiff. The attempts were unsuccessful as the cheques sent to the plaintiff were however returned by the plaintiff through his solicitors, Messrs Sidek Teoh & Dennis.

ANALYSIS AND THE COURT'S DECISION

[35] This court recognises the dispute between the plaintiff and the first defendant relates to a contract for the sale of immoveable property ie the said property where in the event of breach parties can seek equitable relief in the form of specific performance. In this present case, the High Court (which had found that the first defendant was in breach of the contract for sale) had granted the plaintiff an order for specific performance of the contract for sale of the said property. However, upon appeal to the Court of Appeal, the Court of Appeal had substituted the order for specific performance to an award of damages in lieu the specific relief order.

[36] This court is also minded that the law is trite that the plaintiff as the claimant here bears the legal burden to prove that he has actually suffered loss as a result of the first defendant's breach. This court had referred to some of the decided cases on this area of law in the earlier part of this judgment.

[37] It is common ground during the assessment of damages proceedings, that (upon placing full reliance on Gill J's decision in *Central Malaysia Development Co Ltd* and producing a valuation report to show the market value of the said property at the date of the judgment of the Court of Appeal ie 28 July 2016) the plaintiff claimed that he had suffered a loss of RM1.25m. In support of the RM1.25m in damages, it was contended on behalf of the plaintiff that the normal measure of damages for the plaintiff as purchaser of the said property (who had loss the bargain to own the said property) should be the market value of the property at the time the contract is lost less the contract price.

[38] The first defendant had on the other hand argued that in order for the plaintiff to succeed in his claim for damages of RM1.25m, the law requires him to adduce sufficient and credible evidence before this court to prove that he had suffered a loss RM1.25m resulting from the first defendant's breach of the SPA 2006. The first defendant further argued that the plaintiff cannot simply

tender the VR and tell this court that he has suffered the loss in the sum of RM1.25m. According to the first defendant, since the plaintiff had not proven his actual loss, he is only entitled to nominal damages.

[39] As a general rule, in cases of contractual breach, damages should be assessed as at the date of breach. In the present case, the contract entered between the plaintiff and the first defendant was a contract for the sale of an immoveable property.

[40] It must be highlighted that during the assessment of damages proceedings, the counsel for the plaintiff has referred to this court the relevant authorities which have established the legal principle in assessing damages in cases of breach of contract for sale of immoveable property (particularly where the order of specific performance is not granted). Gill J in *Credit Corporation* at p 177 had stated the following:

> It is to be observed that the section is general in its terms, and does not exclude the case of damages for breach of a contract to sell immovable property. In other words, the legislature has not prescribed a different measure of damages in the case of contracts dealing with land from that laid down in the case of contracts relating to commodities. Where, therefore, a purchaser of land claims damages for the loss of his bargain, the question to be decided is whether the damage alleged to have been caused to him 'naturally arose in the usual course of things from such breach.
>
> The normal measure of damages is the market value of the property at the contractual time form completion less the contract price. Because of the difficulties in forming an exact estimate of the market value of a piece of land, on which opinions may well differ, the price at which a plaintiff contracts to resell the property, though strictly irrelevant per se, has been taken as prima facie evidence of the market value. This was done in *Engell v Fitch* where the plaintiff had given evidence of the resale and the defendant had not countered with any evidence that the resale price did not represent the market price. Because of the same difficulties, the resale price obtained by the defendant, who has backed out his contract with the plaintiff on making a better bargain with another party, has been taken as evidence of the market price at the time due for completion (see *Godwin v Francis*). In *Ranchhod v Manmohandas*, which was a case of wilful default on the part of the vendor in completing the title, it was held, following *Day v Singleton*, that the purchaser was entitled to recover not only the deposit with interest and expenses, but the loss of his bargain.

[41] Although the plaintiff's counsel had stated the correct relevant law in assessing damages relating to a contract for sale of immoveable property, but the question arises for this court's determination is this: Was the plaintiff's counsel correct when he took the date of breach of the SPA 2006 to be the date when the contract is 'lost' at the date of the Court of Appeal judgment?

[42] It is not in dispute that the Court of Appeal had handed down its

judgment on 28 July 2016 and the Court of Appeal had substituted the specific relief order to an award of damages. Is the plaintiff correct to contend that the date of the Court of Appeal order should be taken as the date of breach or the date when the contract is lost just because the order of specific performance was replaced with an order for the damages to be assessed?

[43] As mentioned earlier in the judgment, the plaintiff contends that the date of breach or the date the contract is lost is on 28 July 2016 (the date of the Court of Appeal judgment). On the hand, the first defendant argued the date of breach is on 10 July 2007 (ie the date when the first defendant failed to submit the letter requested by the state authority vide the letter dated 10 July 2007). The question then arises, is when the actual date of breach was?

[44] This court opines that it was incorrect for the plaintiff to take the date of the Court of Appeal's decision as the date of breach or the date when the contract is lost. This court finds so on the following reasons:

(a) it may be true that the plaintiff had been denied the specific performance order when the Court of Appeal varied the High Court order. Nonetheless, (as submitted by the first defendant) the Court of Appeal on 28 July 2016 neither made any ruling that the date of breach of the SPA 2006 is on the date the Court of Appeal's order nor did the Court of Appeal make any order that the date of assessing the plaintiff's damages is on the date of its judgment;

(b) in essence, the decision of the Court of Appeal was basically endorsing the HCJ's finding of facts that the first defendant was in breach the SPA 2006 when it had not acted in compliance of the best endeavor clause. The first defendant breaches are namely; 1) delaying the application for consent to transfer; and 2) not pursuing the appeal which resulted in the plaintiff losing the opportunity to complete the sale and thereafter owning the said property. Paragraph [28] of the Court of Appeal's grounds of judgment reads:

> [28] In our view however, the finding of breaches by the Koperasi under the First SPA made by the learned Judge was well supported by evidence both oral and documentary which we found to be well founded. We at the appellate stage would refrain from disturbing these findings of facts as we did not find the learned Judge was plainly wrong. We were therefore in agreement with the learned Judge that the Koperasi was in breach of the First SPA, for delaying the application to the State Authority and not pursuing the appeal, and thereby in breach of duty to act on the best endeavor clause.
>
> Therefore, the plaintiff cannot assume that the substitution of the specific relief order to an award of damages to be the cut-off date of non-granting of the specific performance (the date of breach/the date

when the contract is lost) entitling the plaintiff to take the date of the Court of Appeal's judgment to measure his damages.

(c) the HCJ in finding that the first defendant was in breach of the best endeavour clause under the SPA 2006 had considered the acts/conducts of the first defendant in its late application for the consent to transfer. This has been clearly demonstrated in paras 37–42 of the HCJ's grounds of judgment. For ease of reference, those paragraphs are reproduced below:

> 37. From the evidence adduced at trial, it was established that D1 applied for consent on 26.12.2006 as can be seen from the letter from the Land Administrator dated 19 January 2007. This is a clear breach of cl 3.2 which required the application to be made within 7 days from the date of the 1st SPA i.e. 7 November 2006. It was also in breach of D1's obligation to obtain the consent expeditiously as provided in the same sub clause.
>
> 38. D1 did appeal against the decision of JKT to withhold consent. However, it was only done 7 months later, on 10 July 2007. This was well outside of the time allotted for the procurement of the consent of 3 months (cl 3.1) and a further extension of 1 month (cl 3.3).
>
> 39. According to PW1, the officer from the Land Administrator's Office handling applications for consent to transfer, the reason for the rejection was due to the fact that it was a transfer from a bumiputra entity to a non-bumiputra.
>
> 40. Upon appeal by D1's solicitors via the letter dated 10 July 2007, PW1 said he had minuted upon the said letter the following:
>
> > Dokumen sokongan yang disertakan tidak memadai. Sila sertakan surat dari agen hartanah mengenai usaha mendapatkan pembeli bumiputra.
>
> 41. PW1 said he could not recall if D1 or its solicitor had forwarded any such letter from its estate agent evidencing the efforts expended in securing a bumiputra purchaser. According to him, in the event no such letter was forthcoming, the appeal would not be processed for tabling before JKT for its decision in respect of the application for consent.
>
> 42. DW1, a director of D1, admitted that nothing was done in respect of the Land Office requirement for a letter evidencing efforts to obtain a bumiputra buyer.

From the HCJ's finding of fact that the first defendant was in breach of the best endeavour clause under SPA 2006, this court is of the considered view that breach of said clause was the result of the first defendant's cumulative series of lackadaisical conducts in its application for consent to transfer ie from the exceedingly late submission of the application right up to the first defendant's failure in responding to the request of the state authority minuted in the letter of appeal dated 10 July 2007.

It is common ground that the first defendant's breach of the best endeavour clause had resulted in the failure to obtain the requisite consent to transfer from the JKT/state authority. As consequence of the failure to obtain the same, SPA 2006 could not be completed or have failed to materialise.

This court opines that the first defendant's failure to respond to the State Authority's request which was minuted in the 10 July 2007 letter is the ultimate lackadaisical act/conduct that sums up the breach of the best endeavour clause. Therefore, in this circumstance, it is this court's judgment that the date of the breach was on 10 July 2007.

(d) the SPA between the plaintiff and the first defendant was executed in 2006. The Court of Appeal delivered its decision on 28 July 2016. Clearly here, there was a lapse of more than ten years. It is very obvious and clear that ten years is a very long time and during which the market value of the said property would have appreciated significantly. Hence, if this court was to accept the plaintiff's contention that the date of breach is the date when the Court of Appeal gave its judgment, it would surely cause gross injustice against the first defendant. This is especially unjust considering the fact that even the Court of Appeal was minded that the plaintiff has 'sat comfortably on his rights' for years (while paying rental without protest). Notwithstanding the first defendant's breach, it is equally unjust for this court to simply allow the plaintiff to sit idly while aggravating the loss for years before springing into action to enforce the SPA 2006; and

(e) the said property was sold to the second defendant in 2012 ie after more than six years from the date execution of SPA 2006.

[45] After having ascertained the relevant date of assessment of the plaintiff's damages to be 10 July 2007 (the date of breach) and applying the normal measure of damage in contracts for the sale of immoveable property, what is then the market value of the property on 10 July 2007?

[46] The plaintiff from the beginning had firmly stood on the position that the date of breach was on the date when the Court of Appeal delivered its decision, thereby he had only produced the valuation report of the said property's market value as at 28 July 2016. Clearly, therefore (as submitted by the first defendant's counsel) the said valuation report cannot form the basis for the purposes of quantifying the actual loss suffered by the plaintiff.

[47] In this regard, it was submitted by the first defendant's counsel that since there was absolutely no evidence produced by the plaintiff to prove an actual loss of RM1.25m, thus the plaintiff is only entitled to nominal damages.

[48] Before this court proceeds to determine the appropriate quantum to be awarded to the plaintiff (whether nominal or otherwise), this court will first address the issue of application of cl 9 of SPA 2006 raised by the first defendant.

[49] This court rules that cl 9 of SPA 2006 would have no application in the present case. cl 9 has clearly limited its applicability only in the circumstance that the first defendant fails or deliberately refuses/refuse to complete the SPA and if the plaintiff on the other hand had performed his obligation under SPA, then the plaintiff is therefore entitled to specific performance of the SPA. However, if the plaintiff chooses to terminate the agreement, the plaintiff is thus entitled to get back all the monies paid to the first defendant together with interest.

[50] Thus, cl 9 here actually has two separate limbs. One, being the first defendant's default and the plaintiff's performance of its obligations, and two, the willful election by the plaintiff either to terminate or to insist on specific performance. In the present case, it must first be appreciated that objectively (notwithstanding the narrative of the first defendant's breach) the plaintiff had not 'fully' performed its obligations or paid the full purchase price of the said property. Secondly, the plaintiff did not elect the option to terminate the SPA. By not electing the option to terminate the contract, the plaintiff is entitled to claim specific performance of the said SPA. Thus, strictly speaking, cl 9 of the SPA would only entitle the plaintiff to claim specific performance. Nonetheless, upon the intervention and eminent ruling of the Court of Appeal, the plaintiff was granted damages in lieu of specific performance. Thus, it can no longer be said that the plaintiff's entitlement for damages stemmed from any clause of the SPA 2006. Instead, the plaintiff's entitlement for damages was granted vide the Court of Appeal's Order (and not by any election under cl 9 of the SPA 2006).

[51] Reverting to the quantum of damages to be awarded to the plaintiff, the first defendant's counsel contended that the plaintiff has failed to justify the actual loss that he has suffered since the plaintiff did not produce any evidence to show the market value of the said property as at 10 July 2007. Hence, the first defendant's counsel argued that the plaintiff is only entitled to nominal damages.

[52] With due respect to the counsel for the first defendant, such contention is clearly misplaced against the factual backdrop of the present case. This court opines that just because there was no valuation report to show the market value of the said property on 10 July 2007 it does not mean there was no evidence to ascertain the market value of the said property. The law is trite that this court's power to award and to assess damages is a discretionary one. It is also trite that this discretionary power must be judicially exercised by the court. As an aid to

justice this court is empowered to consider the surrounding facts of the case to assess the damages suffered to the plaintiff arising from the first defendant's breach.

[53] Here, it is not disputed that the plaintiff had lost the opportunity to own the said property. Nevertheless, at the same time there are facts in the present case to show that despite the plaintiff did not get to own the said property, the plaintiff was still allowed to occupy the said property soon after SPA 2006 was executed. This is not at all a case where the plaintiff was totally deprived of use, benefit, and even profit of the said property (although not being able to attain ownership of the said property). In fact, the plaintiff had benefited handsomely from the said property without the knowledge of the first defendant by subletting the said property for a rent of more than six times higher than what he has been paying the first defendant. In addition, it is undisputed fact that the first defendant also had gained a substantial profit in 2012 when the said property was sold to the second defendant at a sale price of RM1,430,000 compared to the purchase price of RM650,000 under SPA 2006.

[54] Based on these facts, this court is of the view that even without having the benefit of a valuation report to show the market value of the said property as at 10 July 2007, an approximate market value can be ascertained by considering the values, and dates of the transaction, as well as the time in between the transactions of the said property between the parties as follows:

(a) SPA 2006 was executed between the plaintiff and the first defendant 29 December 2006. The purchase price of the said property under SPA 2006 was RM650,000;

(b) the first defendant sold the said property to the second defendant in 2012 vide SPA dated 27 November 2012 (SPA 2012) at the purchase price of RM1,430,000;

(c) the difference in value of the said property between SPA 2006 and SPA 2012 is *RM780,000.*;

(d) the time lapse between SPA 2006 and the SPA 2012 is six years;

(e) the said property's value had appreciated 120% within the six years period;

(f) therefore, the average annual appreciation of the said property's value is 20%pa. (Derived from 120% divided by 6 years = 20%); and

(g) therefore, the estimated market value of the property as at 10 July 2007 is: RM650,000 + 20% (RM130,000) = *RM780,000.*

[55] The next question, this court needs to determine is this, when the

market value of the said property as at 10 July 2007 has been determined at *RM780,000,* can the plaintiff's damages be assessed according to the normal measure of damage in contracts for the sale of immoveable property as held in the case of *Central Development* i.e. the plaintiff's damages would supposedly be the market value at the date of breach less the contract price, the plaintiff would supposedly be the differential sum of RM7,800 (market value at the date of breach) minus RM650,000 (contract price) which comes out to the sum *RM130,000.*

[56] Nonetheless, although the normal measure of damages would entitle the plaintiff only to RM130,000, but this court is minded that this general measure would turn a blind eye to two distinct principles and two distinct profits which both the plaintiff and the first defendant has garnered from the facts of the present case. Firstly, it is trite and immovable that no party ought to be allowed to reap benefit from its own delinquent breach against a contract (see *Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1999] 3 MLJ 489 and *Bank Simpanan Nasional v Rudysham bin Abdul Raof* [2016] MLJU 909). Thus, this court must not lose sight from the fact that the first defendant indeed has breached the SPA 2006 (and deprived the plaintiff of ownership of the said property) to strike a better bargain, and a significantly higher sale price under the SPA 2012 with the second defendant (of which the first defendant obtained a lucrative *profit of RM780,000*). Although the valuation in SPA 2012 is about five years from the market value as at 10 July 2007, this court cannot deny nor can it ignore the co-relation of the more profitable bargain the first defendant stood to gain from the SPA 2012, at the expense of the plaintiff losing his bargain under SPA 2006.

[57] If indeed damages were intended to put the parties in a position as though SPA 2006 was fully performed, then the profit from the SPA 2012 is equally the plaintiff's bargain to gain. But the dissonance arises where in the present case, the plaintiff had not paid the full purchase price for the said property. Thereto, the entitlement for the profit under SPA 2012 becomes 'shared' as both the plaintiff and the first defendant have their own fair share of delinquent breaches of SPA 2006 (the first defendant in breaching the SPA 2006 to strike a better deal in SPA 2012, and the plaintiff in not paying the full purchase prince under SPA 2006).

[58] Secondly, this court must uphold the principle that no party should be allowed to sit on his rights and not act to mitigate his losses. And in upholding this principle, this court cannot ignore the fact that the plaintiff has sat on his rights to assert for the specific performance of SPA 2006 for years before initiating this action against the defendants. Furthermore, this court must also be minded that in mitigating the plaintiff's loss the plaintiff has reaped lucrative profits from possession of the said property and subletting the same

for monthly rentals at least six times the rental the plaintiff pays to the first defendant.

[59] Thus, these principles and these facts clearly distinguishes the present case from the normal measure of damages in cases of sale of immovable property. The bare basic valuation of market value and contract price does not at all cover the nuances of the profits and benefits both parties have reaped from the entire facts of the case. Thus, this court must do and must be seen to do justice and factor in all of the nuances and niche facts of the present case and not merely calculate the differential sum between the market value of the said property (as at the date of breach) and the contract price under SPA 2006.

[60] In fact, the plaintiff had maintained possession of the said property until October 2013 and had refused the first defendant's demand for the delivery of vacant possession of the said property to the first defendant. Without the consent and knowledge of the first defendant, the plaintiff has all the while sublet the whole four stories building to a third party (New Soon Yee Fruits Sdn Bhd) for monthly rental of RM7,000. The fact remains that the plaintiff has been collecting rentals at the rate of six times higher than what he has paid the first defendant.

[61] In this regard, even the Court of Appeal had made some remark regarding the subletting and collection of rentals of the said property by the plaintiff. At para [34] of its grounds of judgment, the Court of Appeal had stated:

> ... *The plaintiff after entering into the said First SPA and remained in occupation. Admittedly the plaintiff remained in the property at monthly rental of initially RM600 and later RM1000 but agreed to have benefited an earning of RM7000 from subletting with no costs to him. The plaintiff waited till 2013 to file the suit. The plaintiff sat comfortably on his rights while earning from subletting of the Property without any complaint for over six years.*

[62] With regards to the subletting of the said property to a third party (without the knowledge and consent of the first defendant) in which the plaintiff had benefited in collecting substantial rental (at the rate of more than six times from what he has paid the first defendant) the first defendant's had calculated the plaintiff's profits as follows:

> *(i) From January 2011 until October 2012 RM6400.00 x 22 months = RM140,800.00.*
>
> *(ii) From November 2012 until August 2013 RM6000.00 x 10 months = RM60,000.00.*
>
> Total collection in excess what the plaintiff had paid the first defendant:

RM200,800.00.

[63] It must be noted that the plaintiff had full knowledge that the said property is subject to restriction in interest because it was a *bumiputra* lot and the consent or the approval of JKT was the condition precedent of the sale of the said property.

[64] Another factor that must also be taken consideration in assessing the plaintiff's damages is this; when the SPA 2006 was executed in 2006, the plaintiff had only paid a deposit of RM65,000 to the first defendant. It is not in dispute that the plaintiff has not paid the balance of the purchase price of RM585,000 to the first defendant. Therefore, the first defendant had not received the full benefit of the purchase price of RM650,000, while the plaintiff already reaped full possession over the said property since 2006 (albeit with cheap rental).

[65] As iterated above, this court must not lose sight of the fact that the first defendant had already gained a handsome profit (a better bargain) in 2012 when it sold the said property to the second defendant at a selling price of RM1,430,000 (at the expense of the plaintiff's bargain under SPA 2006). Hence, making a handsome profit of *RM780,000.*

[66] Taking into the consideration of all the above pertinent facts, this court assesses the plaintiff's damages as follows;

(a) a starting point: This court can take either one of the following (both of which sum up to RM780,000)

(i) the differential sum between the bargain the first defendant gained under the SPA 2012 (RM1,430,000) and the bargain the plaintiff lost under 1st SPA 2006 (RM650,000) which comes out to *RM780,000* in profits;

OR

(ii) the market value of the said property as at 10 July 2007 which this court had determined at *RM780,000.*

Hence: the initial sum to begin with is *RM780,000 ('initial sum').*

(b) taking into account that the plaintiff had reaped substantial benefit from subletting of the said property in the sum of *RM200,800*, then this amount must be deducted from the initial sum as the plaintiff is not entitled to be unjustly enriched and cannot profit from the award of damages;

(c) taking into account that the plaintiff had only paid a deposit sum of RM65,000 in 2006 (and he had not paid RM585,000 being the balance

of the purchase price) thus, the plaintiff is not entitled to the full benefit of the market value of the said property as at 10 July 2007 ie RM780,000. The plaintiff is also not entitled to the full profit that first defendant had gained from the sale of the said property to the second defendant as the first defendant must also be compensated for not receiving the full purchase price under the SPA 2006 (ie the benefit the first defendant should have enjoyed from year 2006 until the said property was sold in 2012). In other words, the first defendant was deprived of the benefit of the whole RM650,000. 00 for a period of six years. The first defendant's deprivation of such benefit must be calculated in assessing the plaintiff's damages.

(d) therefore, the calculation of the damages would then be as follows:

(i) *RM780,000* minus *RM200,800* giving a balance of *RM579,200 ('net profit sum')*

(ii) As the first defendant had been deprived off the benefit or did not receive benefit of the full purchase price of RM650,000 for a period six years (from 2006 to 2012), therefore, the net profit sum of *RM579,200* shall be equally shared between the plaintiff and the first defendant.

RM579,200 divided into 2 = RM289,600

(iii) In this instance, this court hereby assess the just and reasonable damages that should be awarded to the plaintiff to be the sum of *RM289,600.*

[67] Regarding the RM65,000 deposit payment issue, this court is of the view that since the plaintiff has initially returned the deposit refund sum (via a cheque dated 2 September 2016 at the sum of RM69,220.97 issued by the first defendant) to the first defendant, thus, the same amount of RM69,220.97 shall be paid or returned to the plaintiff.

[68] This court orders that the amount of RM289,600 shall be paid to the plaintiff with an interest of 5%pa from the date of judgment until full realisation thereof.

[69] This court also orders that there will be no order as to cost for this assessment of damages proceeding. Parties must therefore bear their own costs.

Order accordingly.

Reported by Dzulqarnain bin Ab Fatar